OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 07-02 December 15, 2006

To: All Division Heads, Regional Directors,
Officers-in-Charge, and Resident Officers

From: Ronald Meisburg, General Counsel

SUBJECT: Report on Case Developments
April through August 2006

Attached is a report on case developments in the Office of the General Counsel during the period April through August 2006.

/s/
R.M.

cc: NLRBU
Released to the Public

REPORT OF THE GENERAL COUNSEL

In this report, I have selected cases of interest that were decided during the period from April through August 2006. This report discusses cases which were decided upon a request for advice from a Regional Director or on appeal from a Regional Director's dismissal of unfair labor practice charges. In addition, it summarizes cases in which the General Counsel sought and obtained Board authorization to institute injunction proceedings under Section 10(j) of the Act.

_____/s/_____
Ronald Meisburg
General Counsel

EMPLOYER INTERFERENCE WITH PROTECTED ACTIVITIES

Employer unlawfully reprimanded an employee whose use of offensive language, including a vow to "have his pound of flesh," in an e-mail to management did not lose the protection of Section 7

One interesting case during this four-month period involved whether the Employer lawfully disciplined an employee because he used insulting, critical language, including an alleged threat, in an e-mail to the Employer criticizing a recently negotiated bargaining agreement.

We first determined that the alleged threat in the employee's e-mail, the Shakespeare quotation "I shall have my pound of flesh", is generally used as an idiomatic expression as an intent to collect a debt or obligation rather than as a threat of physical violence. We then decided that the employee used this quotation idiomatically as a lawful statement of intent to continue legal proceedings to the fullest extent. The Employer therefore unlawfully imposed discipline because notwithstanding using other intemperate language, the employee's e-mail did not lose its status as a protected protest of the parties' bargaining agreement under Atlantic Steel Co., 245 NLRB 814 (1979).

The Employer was an orchestra employing basic orchestra members and also rotators, who were the first musicians offered temporary work when a basic orchestra member was temporarily absent. One of the rotators had been involved in several grievances filed over the Employer's refusal to fill permanent orchestra vacancies with rotators. This employee also had filed an age discrimination suit because of the Employer's method of filling permanent orchestra vacancies.

During bargaining for a successor bargaining agreement, the Employer's general manager and attorney proposed that rotators would become permanent members of the orchestra upon the occurrence of vacancies. The Union agreed to this proposal which would also have resolved all outstanding disputes regarding the hiring of rotators, including the rotator employee's lawsuit. The Employer's representative then consulted the Music Staff which refused to agree because it did not wish to abandon its practice of conducting open auditions to fill orchestra vacancies. The Employer informed the Union and the rotator employee that the proposal had been rejected.

The parties continued to bargain and eventually agreed upon a contract that did not change the Employer's hiring practice. The rotator employee sent an e-mail to the Employer complaining about the new contract in which he criticized the Employer for having withdrawn from the tentative rotator hiring agreement, called its general manager and attorney "liars" and "fools," and concluded: "I may not win in Court, but rest assured 'I shall have my pound of flesh.'" The Employer issued a written reprimand to the employee because it considered the “pound of flesh” remark to be threatening.

The quotation "I shall have my pound of flesh" comes from Shakespeare’s play "The Merchant of Venice," where the moneylender Shylock demands that Antonio provide the "pound of flesh" that Antonio had promised Shylock for not timely repaying his debt. In the play, the statement constitutes a threat of literal physical violence and even death. However, the phrase "pound of flesh" over time has become an English idiom for a threat to collect a debt. For example, ”People who cruelly or unreasonably insist on their rights are said to be demanding their 'pound of flesh.'" *The New Dictionary of Cultural Literacy, Third Edition,* (2002). Idiomatic expressions that do not connote

violence generally do not constitute unprotected conduct under the Act. See AT&T Broadband, 335 NLRB 63, 69 ("marked man" an idiomatic expression suggesting that individual would be subject to the loathing of fellow workers for disloyalty, not a threat of death or harm).

We decided that the employee had not used this quotation as a literal threat of physical violence. The context of the employee's use of the phrase instead indicated that he intended its idiomatic meaning, i.e., vindication of his legal rights to the fullest extent possible.

The employee used the phrase in the context of complaining about the Employer's having withdrawn from the tentative agreement to hire rotators. The Employer's withdrawal from that agreement necessarily meant that pending grievances, and the employee's lawsuit, would continue, namely, whether successful or not, the employee intended to have his day in court.

In considering whether an employee’s alleged misconduct is sufficiently egregious to remove it from the protection of the Act, the Board examines the following

factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. Atlantic Steel Co., 245 NLRB at 816. Because the rotator employee was otherwise engaged in protected concerted activity when he forwarded his e-mail, with copies to the bargaining committee members, discussing the merits of the recently negotiated contract, application of the Atlantic Steel factors was considered to be appropriate.

We decided that the "location" and subject matter of the e-mail statements weighed in favor of the Act's protection because of their clearly protected topics (a grievance, a lawsuit and dissatisfaction with the contract). Although the employee's e-mail was a written document as opposed to a spontaneous oral outburst, there is no indication that the statement was made maliciously. The e-mail contained no profanity or obscenity and in context, the language was, at worst, intemperate. Finally, although the employee's e-mail was not provoked by any Employer unfair labor practices, the first three factors all weighed so strongly in favor of the Act's protection

that we decided that the e-mail was protected in its entirety.

Employer lawfully denied offsite employee Union organizers access to exterior non-work areas at its remote oil pipeline pump stations

One case addressed whether the Employer violated Section 8(a)(1) by denying offsite employee/Union organizers access to exterior non-work areas within the security perimeters of its remote oil pipeline pump stations.

We concluded that the Employer acted lawfully in denying access because, under the standard established in Tri-County Medical Center, 222 NLRB 1089, 1089 (1976), employers are required to grant offsite employees access only to exterior non-work areas, and there were no such areas within the security perimeters. We noted that the Board has applied Tri-County principles to offsite employees in Hillhaven Highland House, 336 NLRB 646, 648 (2001), enfd. sub nom. First Healthcare Corp. v. NLRB, 344 F.3d 523 (6th Cir. 2003), and ITT Industries, 341 NLRB 937 (2004), enfd. 413 F.3d 64 (D.C. Cir. 2005). In those cases, the Board determined that although employers have a heightened property interest with regard to offsite as

opposed to onsite off-duty employees, absent sufficient business justification, the Section 7 access right of offsite employees is a primary, non-derivative right that will generally outweigh those property interests.

The Employer in this case readily granted offsite employee-organizers access to parking lots located outside the security perimeters at each of the pump stations, but refused to permit them to meet with pump station employees inside the security perimeters. The evidence supported the Employer's contention that the entire area within each pump station's security perimeter was a work area. To be sure, there were employee living quarters within this area that technically were not work areas. Nonetheless, there were no places outside the living quarters, yet within the security perimeters, that were equivalent to the parking lots, sidewalks, gates, and other exterior non-work areas to which the Board under Tri-County will permit access. Thus, the pump stations were enormous installations that could be traversed by vehicles only along uniquely laid out, informal and unpaved traffic patterns, rather than by a formally laid out internal system of roads and walkways. Thus, even an offsite employee would have been on unfamiliar ground and no better able to navigate another

pump station than a stranger. Accordingly, in the absence of any identifiable Tri-County exterior non-work areas within the security perimeters, we concluded that there was no basis for granting offsite employee organizers access to the pump station compounds under Hillhaven or ITT.

Finally, we rejected the argument that in the absence of any exterior non-work areas within the security perimeters, the Employer should have been required to admit the offsite employee organizers to the interior of the living quarters in order to effectuate their Section 7 right to communicate with the onsite pump station employees and the onsite employees' statutory right to receive that organizational message. Such a contention would depart from the balance struck between employee Section 7 and employer property interests under Tri-County and Hillhaven/ITT, and would constitute a novel extension of existing Board law. Further, even if such an extension would be appropriate, we viewed this case as a particularly poor vehicle for arguing such an extension. First, the Employer apparently plans to modernize its operations by operating unmanned pump stations remotely from a centralized facility. Second, the Union has an alternate means of communication (from outside the security

perimeter) which lessened the impact on Section 7 rights of a lack of access within the security perimeter.

Employer's offer of money in exchange for testimony interfered with the employees' Section 7 right to decide whether to participate as witnesses in government proceedings

In this case, we concluded that the Employer unlawfully attempted to taint Board processes by offering witnesses money to testify in a Board proceeding. In the circumstances presented, we found that by offering witnesses money to testify, the Employer interfered with the individuals' right to decide for themselves whether they wished voluntarily to cooperate in a Board hearing, and thereby impeded the Board's process in violation of Section 8(a)(1) of the Act.

The Region issued a complaint alleging that the Employer refused to hire 13 named employees in order to avoid its bargaining obligation as a successor. After the issuance of complaint, an Employer agent approached three of the employees named in the complaint and allegedly offered them amounts between $5,000 and $15,000 to provide testimony or write a statement in support of the Employer.

Section 7's protections include the right to act in concert with others in providing evidence in workplace disputes and the right to decline voluntarily to support one side or the other in the dispute. See, GHR Energy Corp., 294 NLRB 1011, 1014 (1989), affd. mem. 924 F.2d 1055 (5th Cir. 1991); Teamsters Local 439 (University of the Pacific), 324 NLRB 1096, 1098 (1997), enfd. 175 F.3d 1173 (9th Cir 1999). We concluded that offering witnesses excessive payments to testify interfered with their freedom to decide for themselves whether to voluntarily participate in the resolution of a dispute in their workplace.

The circumstances here were similar to those in Victor's Café 52, Inc., 338 NLRB 753 (2002), a compliance case. There, an offer to pay an individual to testify in a Board proceeding on behalf of a party in the hearing was grounds for excluding witness testimony and disqualifying a discriminatee from back pay. The Board found that an offer of payment for testimony that was far in excess of what might be justified as compensation for a witness' time or expenses was an attempt to influence and manipulate a witness in a Board proceeding. Id. at 755. The amounts offered to the discriminatees here were similarly unreasonably large.

We concluded that the offer of payment to the witnesses not only interfered with the Board's processes, but also interfered with the free choice of the employees to decide for themselves whether they wished to provide evidence voluntarily in a workplace dispute. We also relied on Cherry Hills Textiles, Inc., 309 NLRB 889 (1992), enfd. 7 F.3d 221 (2d Cir. 1993). There, attempts to persuade a witness either to provide false testimony or to refrain from testifying in a Board hearing constituted interference with the individual's right to freely decide to cooperate in a Board proceeding.

Employer lawfully requested discovery of communications between named class action plaintiffs and the Union

One case during this period presented the question of whether Employers in a state court lawsuit violated Section 8(a)(1) of the Act by seeking through discovery information that involved Section 7 activities. In this case, several employees had filed class action wage hour lawsuits against several employers in their industry. The class action plaintiffs were represented by the same law firm that represents a Union trying to organize the employees of these employers. The Union had been actively involved in

investigating the claims underlying the class action and was funding the litigation.

The defendant Employers suspected that the Union was "driving" the litigation, and they were considering moving the court to disqualify the plaintiff employees' law firm based on a conflict of interest by virtue of its representing both the plaintiff employees in the class and, in other matters, the Union. They commenced discovery on this issue and the plaintiffs' attorneys filed objections to many of the requests on the ground that they infringed upon employees' Section 7 rights.

The judge granted the motion in relevant part. As to the argument that the discovery requests infringe on employees' Section 7 rights, the judge ruled that Section 7 does not insulate the plaintiffs from the discovery of communications regarding the lawsuit. The judge stated that some of the evidence requested in discovery was essential to prove or disprove the claim of the Union's conflict of interest and that any incidental infringement on Section 7 interests would be outweighed by the need to determine whether there exists a conflict of interest.

We concluded that the information sought was relevant to determining whether class counsel should be removed due to a conflict of interest, and the Employers' interest in obtaining the information outweighed any harm to employees' Section 7 rights.

In deciding this case, we acknowledged that when an employer pursues in discovery information regarding Section 7 activity, the Board must consider whether the employer's constitutional interest in access to the courts and its legitimate use of legal proceedings in pursuit of those claims justifies the employer's actions. That inquiry turns in part on the relevance of the information sought to the matter at issue in the lawsuit. See Maritz Communications Co., 274 NLRB 200 (1985); Wright Electric, Inc., 327 NLRB 1194 (1999), enfd. 200 F.3d 1162 (8th Cir. 2000); and Guess?, Inc., 339 NLRB 432 (2003). In Guess, the Board announced a three-step analysis for determining whether questions that pertain to employees' protected concerted activities are permissible when propounded during discovery in a civil proceeding. Specifically, (1) the questioning must be relevant; (2) it must not have an "illegal objective;" and (3) the employer's interest in

obtaining the information must outweigh the employees' Section 7 confidentiality interests. 339 NLRB at 434.

Applying Guess, we first concluded that the information sought by the Employers in the instant case was relevant. Each of the discovery requests at issue concerned factors relevant to whether there was a conflict of interest between class counsel and the named plaintiffs. These are valid areas of inquiry relevant to the appropriateness of class certification. See, e.g., Kamean v. Teamsters Local 363, 109 F.R.D. 391 (S.D.N.Y. 1986). Further, the judge, in ruling on the motion to compel discovery, found that the information was essential to the issue of conflict of interests, and that the circumstances raised a serious question of whether class counsel should be disqualified, warranting further discovery.

We then assumed, as the Board did in Guess, that the requests did not have an "illegal objective" and, applying the balancing prong of the Guess test, we concluded that the Employers' interest in the information outweighed any potential harm to employees' Section 7 rights. In this regard, the employees about whom information was sought were named plaintiffs who had made known their ties to the

Union. Given this, any infringement on employees' confidentiality interests would be minimal at most. In contrast, the Employers' interest in the requested information was critical to determining whether the alleged conflict of interest rendered the class action inappropriate. The judge found the discovery was narrowly tailored to that purpose.

We therefore concluded that the discovery requests did not violate Section 8(a)(1) because the Employers' substantial need for the requested information outweighed any potential harm to employees' Section 7 rights. However, in so doing, we noted serious concerns as to whether the balancing test articulated in Guess should be applied at any stage of a reasonably-based lawsuit in light of BE & K Construction Co. v. NLRB, 536 U.S. 516 (2002). We also noted that it is unclear whether "illegal objective", as the Board apparently defined it in prior discovery cases, would pass muster under the Supreme Court's holding in BE & K. However, since there was no violation under existing Board precedent, we decided that this case did not present an appropriate vehicle to have the Board to clarify those issues.

RECOGNITION OF MINORITY UNION

Premature Recognition of Union Following Relocation and a Reasonably Certain Expected Large Increase in Workforce

In another case, we concluded that the Employer violated Section 8(a)(2) and (3) of the Act by recognizing Union A and entering into an agreement with a union security clause because at the time of recognition, the Employer had not hired a substantial and representative complement of employees. We also found that Union A violated Section 8(b)(1)(A) and 8(b)(2) by accepting recognition and entering into the agreement containing a union security clause.

Prior to the recognition of Union A, the Employer operated four facilities and Union B represented approximately 540 employees in a multi-facility unit. In 2001, the Employer acquired another company that manufactured the same type of products as the Employer's other four facilities. Union A represented the approximately 83 unit employees at this newly acquired fifth facility.

In August 2004, Union A and the Employer negotiated a successor agreement pursuant to which the Employer agreed to recognize Union A as the representative of the unit employees at a sixth facility not yet opened. Later that month, the Employer closed the newly acquired fifth facility represented by Union A and offered the employees jobs at the new sixth facility. That offer was accepted by 70 of the 80 employees then working. When that sixth facility finally opened in November 2004, the Employer treated Union A as the bargaining representative and applied its August 2004 collective-bargaining agreement with Union A to the employees.

The sixth facility had almost 450,000 square feet of space while the fifth facility had only 50,000 square feet. The four facilities represented by Union B collectively had about 600,000 square feet of space. When the sixth facility opened, the Employer decided in the near future the work in the other four facilities would be relocated there, although it claimed that the timing of the closures of the other facilities had not then been set. The Employer closed the first of the four facilities at the end of December and two of the remaining three other facilities represented by Union B were closed in the summer of 2005.

The Employer intended to hire 200 to 500 new full-time bargaining unit employees at the sixth facility within the next two years, based upon business conditions. The Employer decided not to offer transfers to the employees in the four facilities but instead to consider them if they applied as new employees at the sixth facility.

At the time the sixth facility opened, 84 unit employees were employed there. One month later, 216 unit employees were employed and the employees transferred from the fifth facility represented only 39% of the workforce. By January 2005, there were 296 employees working at the sixth facility and the original Union A-represented employee complement had slipped to only 28% of the workforce. All new hires were subject to the union security clause after 30 days.

We determined that the sixth facility did not constitute the mere relocation of the fifth facility represented by Union A, since it appeared that the Employer also intended to consolidate and relocate work from the Union B facilities to the sixth facility. The Employer acquired space far in excess of the needs of the work formerly performed at the fifth facility represented by

Union A. The Employer admittedly planned to close the remaining four Union B represented units and knew that at some point, work from those facilities would be relocated to the sixth facility. Both the size of the sixth facility and the expansion of the workforce in two months to nearly three times the size when operations began undermined the Employer's argument that it was privileged to grant recognition to Union A. An employer violates Section 8(a)(2) if it recognizes a union at a time when it expects that the unit will expand in the immediate future and is able to predict that expansion with a "reasonable certainty." O-J Transport Co., 333 NLRB 1381, 1389 (2001) (the employer prematurely recognized a unit of employees when the representative complement expanded more than 10-fold practically overnight).

In this case, it was clear that the Employer intended to hire new employees through ads, hiring services, etc. The quick hiring of many new employees did not reflect a natural, gradual expansion of operations, but rather was consistent with a finding that the Employer knew at the outset that its original employee complement was only the

start-up force and would not remain a majority of the workforce very long.

In these circumstances, we concluded that the Employer recognized Union A, and Union A accepted recognition, prematurely. The rights of the newly hired employees to select or reject a bargaining representative were violated by the recognition of the Union A based on the desires of less than 30% of the employee complement a mere two months after recognition. The appropriate point in time for measuring when the Employer employed a substantial percentage of the new work force was not on the date the new facility opened, but rather on the date when the workforce was representative of the full complement planned by the Employer for the intended actual operation. Cf. Harte & Co., 278 NLRB 947, 949 (1986) (appropriate point in time to measure whether a substantial percentage of the new work force is composed of transferees was when employer's relocation process was substantially complete). This did not occur here until at least January, when the Employer employed 296 employees at the sixth facility.

EMPLOYER REFUSAL TO BARGAIN IN GOOD FAITH

Parties' Memorandum of Agreement Did Not Privilege the Employer's Unilateral Changes

Another interesting case involved whether the Employer, a major daily newspaper, violated Section 8(a)(5) when it unilaterally assigned to its newsroom employees the development of original content for its website. In June 2005, the Employer instructed some of its newsroom employees to interact with readers online using a variety of interactive online technologies, including conducting real-time Q & A "chats" with readers and developing "podcasts," by which on-line readers could access specially-produced editorial content. The Employer argued that an expired 1995 Agreement with the Union privileged it to assign this work unilaterally, even though that agreement had simply resulted in the creation of an online reproduction of the newspaper, rather than the creation of original editorial content under the more recent interactive technologies. We decided that a "contract interpretation" analysis of the Agreement established that the parties had never intended that the Employer could assign newsroom employees the task of producing original and exclusive material for the Employer's website.

We have taken the position that in unilateral change implementation cases involving a claim of contractual privilege, the Board should modify its current "clear and unmistakable" waiver standard in favor of simply interpreting the parties' agreement. This approach would avoid conflicts with circuit courts that apply a "contract coverage" analysis, and would also clarify the Board's occasionally inconsistently applied contractual waiver standard. In engaging in contract interpretation, the Board should take into account all relevant factors, including: (1) the wording of the proffered sections of the agreement at issue; (2) the parties' past practices; (3) the relevant bargaining history; and (4) an interpretation of any other provisions in any bilateral agreement or arrangement that may shed light on the parties' agreement concerning the change at issue.

All of these factors led us to conclude that the Employer unlawfully assigned this work to unit employees without bargaining. First, the Agreement’s language indicated that it was not intended to cover the changes made by the Employer's new online initiative. Second, the past practice under the Agreement, namely the development of a website in 1995 that merely reproduced the print

newspaper, did not contain exclusive or original content encompassed by the Employer’s current initiative. Third, the parties' bargaining history indicated that the Agreement was never intended to privilege the Employer to assign newsroom employees to produce original and exclusive online material for its website. Finally, no other contract provisions or bilateral arrangements shed light on the parties' Agreement. Accordingly, we decided that the factors traditionally relied on by the Board and courts when interpreting collective-bargaining agreements established that the Agreement was never intended to allow the Employer to unilaterally assign newsroom employees the work of producing original and exclusive content for its website.

The Employer did not violate Section 8(a)(1) or (5) by refusing to recognize and bargain with the Union as the minority bargaining representative only for its members

In a significant case during this period, we concluded that an employer has no statutory obligation to recognize and bargain with a union seeking to bargain as a minority representative for its members only. This conclusion was based on the language of the NLRA, its legislative history, and Board and Supreme Court decisions interpreting the Act, all of which underscore that the statutory obligation to

bargain is fundamentally grounded on the principle of majority rule.

An employee “Council” was formed as an affiliate of a major International Union. The Council did not represent a majority of employees in any appropriate bargaining unit, but consisted of a number of dues-paying members employed by the Employer. The Council requested that the Employer bargain with it over several matters, and the Employer at all times refused. The Union filed a charge alleging that the Employer violated Section 8(a)(1) and/or (5). The theory of the charge was based on the conclusions of Professor Charles Morris' book, The Blue Eagle at Work, that an employer's refusal to recognize a members-only union violates the Act.

The Union’s first argument was that general principles of statutory construction obligate an employer to bargain on a members-only basis. The Union asserted that Section 7 broadly protects the right of all employees, organized and unorganized, to engage in collective bargaining, and therefore an employer's refusal to recognize and bargain with a minority union on a members-only basis constitutes interference with that right in violation of Section 8(a)(1). Furthermore, it argued that the Act's only

limitation of the broad bargaining right guaranteed by Section 7 is Section 9(a) which, it contended, is applicable only after a union attains exclusive majority status.

Second, the Union argued that the legislative history of the Act supports minority union bargaining. It claimed that members-only minority bargaining historically was not only commonplace, but mandated under the National Industrial Recovery Act (NIRA), the precursor to the Act.

We first concluded that the statutory language, legislative history, and cases interpreting them clearly demonstrate that the drafters of the National Labor Relations Act envisioned a policy of "encouraging the practice and procedure of collective bargaining" firmly based on the principle of majority rule. When Congress enacted Section 9(a), which sets forth the majority rule, it explicitly rejected other forms of representation, including plural and proportional representation, which were permitted under Section 7(a) of the NIRA. Statements by the Act’s sponsors show that they did not intend to require employee representation by minority-supported unions because it could not lead to a working system of collective bargaining. Congressional reports on the Act

also recognized the impracticality of a system that could result in an employer having to bargain with several minority-supported unions representing different segments of the same unit of employees. These reports demonstrate that Congress understood that minority union bargaining would undermine the potential for meaningful collective bargaining.

In directing the Region to dismiss the charge, we also relied on Board and Supreme Court constructions of the Act demonstrating that the duty to bargain is based on majority rule. In the early enforcement of the Act, the Board held that an employer may recognize and bargain with a minority, members-only union, as long as the employer does not extend that union exclusive status. Consolidated Edison Co. of New York, 4 NLRB 71, 110 (1937), enfd. 95 F.2d 390 (2d Cir.), modified on other grounds 305 U.S. 197 (1938). However, nothing in the statutory language, legislative history of the Act, or decisions interpreting the Act, establish an employer's duty to do so.

Furthermore, the Board has never construed Section 8(a)(5) as operating independently from Section 9(a). The Board will therefore not find a Section 8(a)(5) violation for refusing to bargain, and will not issue a bargaining

order, where a members-only union is not the majority representative.

We also addressed the Union’s contention that even if Section 8(a)(5) does not mandate minority bargaining, such an obligation is found in Sections 7 and 8(a)(1). We acknowledged that a bargaining order can be premised on Section 8(a)(1) in addition to Section 8(a)(5). However, as with Section 8(a)(5), the union's majority status is a prerequisite to the issuance of a Section 8(a)(1) bargaining order.

In sum, we rejected the Union’s argument based on the language of the statute, the legislative history, and distinctions of well-settled Board and Court cases. Nor did we view this as an open issue for the Board. Rather, the statutory language, the legislative history, and Board and Supreme Court decisions interpreting the Act all mandate the conclusion that an employer is not required to bargain with a union seeking to bargain as a minority representative for its members.

UNION REFUSAL TO BARGAIN IN GOOD FAITH

Union Arguably Misrepresented the True Status of the Pension Fund at the Bargaining Table

We concluded that a Section 8(b)(3) complaint alleging bad faith bargaining was warranted in a case in which the Union, through its president, misrepresented the true status of its pension fund at the bargaining table.

During negotiations for a successor contract, a primary issue was whether the Employer would continue to participate in the Union's multi-employer pension plan. During the second bargaining session, the Employer's negotiator submitted a written inquiry to the Union regarding the solvency of the Union's pension plan, including whether the fund was underfunded. According to the Employer, the Union president, who was also a plan trustee, stated that the plan was not underfunded and the Employer did not have to worry about withdrawal liability. As a result, the Employer agreed to continue participating in the plan and subsequently signed a new collective-bargaining agreement. After signing the contract, the Employer learned that the plan was, and had been, underfunded when bargaining occurred.

We determined that the Union president possessed the information requested by the Employer but misrepresented the facts in order to get the contract signed. The Union president was a trustee of the fund and had been present at trustee meetings held prior to negotiations during which withdrawal liability figures had been set and she also had access to the plan's annual report. Moreover, fund administrators had signed a Department of Labor form showing that the plan was underfunded just one week before the Union president provided the Employer with the information at the negotiation session.

We concluded that the Union had a duty to make truthful representations at the bargaining table and that the Union's failure to do so amounted to bad faith bargaining in violation of Section 8(b)(3) of the Act. A union's duty to provide accurate information pursuant to Section 8(b)(3) is parallel to the duty of an employer under Section 8(a)(5). See California Nurses Association, 326 NLRB 1362 (1998); Plasterers Local 346 (A.G. Brawner Plastering, Inc.), 273 NLRB 1143, 1144 (1984). The Board has held that a material fraudulent misrepresentation during negotiations violates a party's duty to bargain in good faith. See Waymouth Farms, 324 NLRB 960, 961-62

(1997), enfd. in pertinent part 172 F.3d 598 (8th Cir. 1999) (employer misrepresented its intentions about plans to relocate its business).

With respect to the remedy, we noted that because the plan calculates withdrawal liability at the end of its fiscal year, there was no evidence that the Employer's withdrawal liability was affected by the Union's bad faith bargaining. Further, there was uncertainty as to what, if any, liability the Employer would incur should it withdraw when the current contract expires; and a rescission order might adversely impact employees who had retired since the current contract was executed. Therefore, we decided not to seek rescission of the contract or a make-whole remedy for the Employer.

SECONDARY BOYCOTTS AND/OR AGREEMENTS

Whether a Hotel and a Labor Coalition, Acting as a Customer in a Commercial Transaction Rather Than Solely as a Labor Organization, Violated Section 8(e)

In a unique and novel set of facts, we decided to dismiss, absent withdrawal, a Section 8(e) charge regarding a labor federation's commercial contract with a hotel to host a convention, where the contract provided that the hotel would not take deliveries for 30 days from a beer

distributor involved in a labor dispute. We determined that the particular facts of the case made it an inappropriate vehicle with which to present the Board with difficult and novel legal issues as to: (1) whether the interim labor federation was a Section 2(5) labor organization; and (2) even if it was, whether in enacting Section 8(e), Congress was concerned about commercial contracts entered into by a labor organization acting as a consumer of services rather than in connection with any employee representational capacity.

The federation was formed in June 2005 by several international labor organizations, and scheduled a founding convention in St. Louis during September 2005, where it became a “coalition” and ratified a constitution. The federation had entered into a commercial contract with a hotel to host the convention; one provision of that contract was that the hotel agreed not to accept deliveries for 30 days from a beer distributor involved in a primary contract dispute with a local union. The 30 days were to cover the 8-day period when the federation and two other labor groups were holding conventions at the hotel, and were intended to avoid the labor groups facing any ambulatory picketing when the distributor was making

deliveries to the hotel. The hotel stockpiled product from the distributor prior to the 30 days.

We initially concluded that although the 30-day contractual cessation of deliveries might arguably fall within the literal proscription of Section 8(e), it was unclear whether Congress intended to prohibit commercial agreements between a labor organization acting as a consumer of goods or services and the provider of such good and services, where part of such an agreement was that the provider would boycott a primary employer. Despite the "sweeping" language of Section 8(e) the Supreme Court had recognized an exception in holding agreements to preserve bargaining unit work to be lawful, and finding that Section 8(e) paralleled Section 8(b)(4). National Woodwork Mfrs. Assn v. NLRB, 386 U.S. 612 (1967). We also noted that Section 8(b)(4) does not bar requests to neutral employers to cease doing business with primary employers, NLRB v. Servette, Inc., 377 U.S. 46 (1964), and that groups that are not Section 2(5) labor organizations are free to enter into commercial contracts accommodating interests, including boycotts, similar to that of the federation. Further, we noted that although the 30-day duration of the delivery ban exceeded the actual time the labor groups were

holding their conventions, it was not an agreement to ban deliveries for the duration of the local union’s primary dispute.

In addition to those Section 8(e) considerations, the facts presented an unusual situation where the federation was not clearly a "traditional" labor organization but was a short-lived, transitional group not aimed at directly representing employees. The existence of the federation, the entity that signed the commercial contract with the hotel, ceased at the convention. While the federation was arguably a Section 2(5) labor organization, resolving that question would only add to the complexity of the Section 8(e) issues. In all the circumstances, we concluded that the case was not an appropriate vehicle in which to present the Section 8(e) issue to the Board.

SECTION 10(b)

Six-Month Limitations Proviso to Section 10(b) Was Tolled with Respect to an Allegation That the Employer Unlawfully Sponsored a Decertification Effort Where the Employer's Assistance Was Covert until It Was Revealed to an Employee

We concluded in this unusual case that the six-month limitations proviso to Section 10(b) of the Act was tolled with respect to an allegation that the Employer covertly

sponsored a decertification effort more than 18 months prior to the Union's filing of the charge. A replacement employee approached the Union in May 2005 with information that the Employer, in December 2003 or January 2004, had covertly encouraged and aided three replacement employees, including him, to engage in a decertification effort among the replacement employees during a lockout of Union-represented employees. We concluded that the Charging Party Union would have been unable to discover sufficient facts within the original limitations period to have gained either actual or constructive notice of a violation. The Employer carefully concealed the facts necessary to establish a violation from everyone except the three employees directly involved in sponsoring the decertification campaign. Under these circumstances, we remanded this case to the Regional Director for a decision on the merits of the allegation.

When the parties' most recent collective-bargaining agreement expired in September 2003, the Union began an economic strike in support of its bargaining demands. The Employer immediately began hiring permanent replacements for the approximately 85 strikers and announced an economic

lockout in January 2004, which has continued to date. No strikers were recalled.

In May 2005, a former replacement employee voluntarily approached the Union and described for the first time the circumstances surrounding the Employer's covert sponsorship of a decertification petition. He told the Union that the Employer had summoned two other employees and himself to a meeting in late December 2003 or early January 2004 to initiate a decertification effort among the replacement employees. The Employer gave the employees written guidelines on how to decertify the Union. The Employer also cautioned the three employees to keep the Employer's sponsorship of the decertification effort a secret and to destroy the written guidelines after they became familiar with the contents. The employee further reported to the Union that the Employer gave the three employees a master list of employees to enable them to solicit signatures on a decertification petition, and also provided them with sheets of paper with a typed heading, "I Do Not Want the Union." The employee told the Union that the Employer threatened the three replacement employees that if they did not get signatures on the petition, they could lose their jobs.

We decided that because of the deliberate secrecy on the part of the Employer to keep its involvement in the decertification effort hidden from the Union, as described by the former replacement employee, it was impossible for the Union to have gained either actual or constructive knowledge of the alleged violations within the Section 10(b) period. We concluded that no degree of due diligence on the part of the Union could have reasonably led it to discover the Employer's covert sponsorship of the decertification petition inasmuch as the Employer's strategy from the outset, as described by the former replacement employee, was to keep it hidden from the Union.

The Board recognizes that a charging party must have knowledge of the facts necessary to support a present, ripe unfair labor practice charge, and that unconfirmed suspicion does not fulfill this requirement. Esmark, Inc. v. NLRB, 887 F.2d 739, 745 (7th Cir. 1989). A union is not required to predict the future as a situation gradually unfolds and as facts that establish actual notice manifest themselves. Leach Corporation, 312 NLRB 990 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995). As the Board found in R.G. Burns Electric, 326 NLRB 440, 441 (1998), a union's "mere

suspicion" of a violation outside of the limitations period is not tantamount to constructive notice sufficient to give the union the "clear and unequivocal" notice required to trigger the running of the Section 10(b) period.

In our case, the Union did not have actual notice of a violation within the Section 10(b) period because there was no evidence that anyone made the Union aware of the Employer's alleged involvement in the decertification effort. Nor could the Union be charged with constructive notice of a violation such as to bar the tolling of Section 10(b) because it had no means by which it could have reasonably discovered the allegedly covert nature of the decertification effort. The only individuals privy to the allegedly covert actions were the employer officials and the three non-Union employees promoting the petition. The other replacements who supported the petition presumably had no knowledge of the Employer's involvement. Thus, even if the Union had tried to discover the origins of the petition, its efforts would have been fruitless.

REMEDIES

Under General Counsel Memorandum 06-05, It Was Appropriate to Seek Specific Affirmative Remedies in Addition to Traditional Remedies to Adequately Protect Collective Bargaining During the Initial Year of the Parties' Bargaining Relationship in Two Cases

In two cases, we considered what specific types of "special remedies" were appropriate to seek given the number and types of violations in situations where a union, either through an initial certification or a successor employer situation, was negotiating for an initial collective-bargaining agreement.

In one case, the employer had taken over a cleaning contract as a Burns successor (NLRB v. Burns Int’l Security Services, 406 U.S. 272 (1972)) for a unit of five employees. The employer initially rejected outright the union’s demand for bargaining. After agreeing to an informal settlement of a Section 8(a)(5) charge, requiring the employer to post a notice and to recognize and bargain with the union, the employer again refused to bargain.

We decided that seeking affirmative remedies requiring notice reading and periodic bargaining status reports was warranted given the employer’s disregard of its obligations

under the settlement agreement and its ongoing refusal to bargain. See Betra Mfg. Co., 233 NLRB 1126, 1126-27 (1977), enfd. 624 F.2d 192 (9th Cir. 1980) (table), cert. denied 450 U.S. 996 (1981) (special remedies warranted where employer continued to bargain in bad faith in breach of 8(a)(5) settlement agreement). Notice reading ensures both that employees learn about their statutory rights, and that they gain assurance from a high level employer representative or alternatively a government official that an employer will respect those rights. United States Service Industries, 319 NLRB 231, 232 (1995), enfd. mem. 107 F.3d 923 (D.C. Cir. 1997) (quoting J.P. Stevens & Co. v. NLRB, 417 F.2d 533, 540 (5th Cir. 1969)) ("the public reading of the notice is an 'effective but moderate way to let in a warming wind of information, and more important, reassurance.'"). Given that the employer had already posted and disregarded a traditional Board notice, we concluded that the notice to be read and posted should contain special language modeled on the Board's notice in Betra Mfg. Co., 233 NLRB at 1128, acknowledging the employer's failure to comply with the previous posting.

Given the employer's obdurate refusal to meet and bargain with the union, we further concluded that periodic

reports on the status of bargaining were necessary to ensure that good-faith bargaining takes place, and authorized the Region to seek an affirmative order requiring the employer to provide, upon the Regional Director's requests "made at reasonable intervals," reports on the progress of the parties' negotiations. See, e.g., Harowe Servo Controls, 250 NLRB 958, 964, 1123-24 (1980).

In the second case, the union was certified to represent a unit of approximately 10 of the employer's drivers. The parties met for 11 bargaining sessions over 13 months; halfway through that period, there was a two-day strike supported by all but one unit employee. A complaint issued alleging, among other things, that the employer violated Section 8(a)(3) by implementing, and then rescinding, a substantial hourly wage increase; violated Section 8(a)(5) after the strike by unilaterally changing its past practices of assigning drivers to a specific truck each day and allowing drivers to take company truck keys and cell phones home with them; and violated Section 8(a)(1) by telling employees they could not discuss the strike with customers. It also violated Section 8(a)(5) by delaying in responding to union requests for bargaining dates, by cancelling bargaining dates, and by not making

itself available for bargaining at reasonable intervals, and by engaging in bad faith bargaining by insisting on proposals that would leave employees with fewer rights than they would have without a contract, i.e., insisting on proposals that would give the employer the right to make unilateral changes in subcontracting and hours of work and that would provide for arbitration only at the employer's option, along with a no-strike clause.

We agreed that seeking an extension of the union's certification year was appropriate under Mar-Jac Poultry Co., 136 NLRB 785 (1962). We also decided that seeking certain other "special remedies" before the Board was appropriate. Thus, because of the employer's failure to meet and bargain in good faith as shown by its various delays in responding to union requests for bargaining, cancellation of bargaining sessions, and by not making itself available for bargaining at reasonable intervals, a remedy affirmatively requiring the employer to meet and bargain reasonably often and for reasonably long periods of time would be appropriate, as would requiring the employer to report in writing on the progress of bargaining to the Regional Director upon his requests made at reasonable intervals. Harowe Servo Controls, 250 NLRB at 1123-25.

We further concluded that instead of a possible affirmative requirement that the employer withdraw certain of its bargaining proposals, the appropriate remedy would be to seek a specific provision requiring the employer to cease and desist from in any manner engaging in surface bargaining or bad faith bargaining, specifically by offering bargaining proposals that would interfere with the employees' exercise of Section 7 rights and that would reserve to the employer complete control over the terms and conditions of employment of its employees, while providing to the union no effective means to redress grievances. Target Rock Corp., 324 NLRB 373, 375 (1997)(order para. 1(d)), enfd. 172 F.3d 921 (D.C. Cir. 1998) (table).

SECTION 10(j) AUTHORIZATIONS

During the three month period from April 1 through June 30, 2006, the Board authorized a total of six Section 10(j) proceedings. Most of the cases fell within factual patterns set forth in General Counsel Memoranda 06-02, 01-

03, 98-10, 89-4, 84-7, and 79-77.[1] Two cases were somewhat unusual and therefore warrant special discussion.

The first case involved a union organizing campaign among 85 non-professional employees of a nursing home. The Union won a Board election to which the Employer filed timely objections. An administrative law judge overruled all the objections and recommended that the Union be certified. While the objections were pending before the Board, the Employer allegedly engaged in serious unfair labor practices, including threats, an across-the-board wage increase, the discriminatory discharge of two employees, the warning of one employee, and the reduction of work hours of three employees. There also was substantial evidence that these violations had a chilling impact on employee support for the Union. There was lower attendance at Union meetings; employees no longer dealt with the Union's organizer; and employees were afraid of being terminated if they continued to support the Union. The Board concluded that Section 10(j) proceedings were warranted to protect the potential status of the Union as the certified bargaining representative from irreparable

[1] See also NLRB Section 10(j) Manual (September 2002), Section 2.1, "Categories of Section 10(j) Cases."

harm during Board litigation. The district court granted an injunction in this case.

The second case involved a recidivist employer with a record of numerous violations established in court-enforced Board decisions. In one of these decisions, the Board found that, shortly after the Union election victory and continuing through the parties' initial negotiations, the Employer unilaterally reduced the size of the bargaining unit by increasing its use of staffing agency employees while not hiring new employees into the unit. Thus, by attrition, the unit was reduced from about 40 employees to 6. The Board and appellate court ordered restoration of the unit to its pre-violation size, but left for compliance a determination of the exact ratio of unit employees to staffing agency employees. After the unit was nearly eliminated, the Employer withdrew recognition from the Union based on asserted loss of support that occurred while there were numerous unremedied violations. Based on this withdrawal of recognition, the Board sought a contempt order in the appellate court for violating the bargaining order in the test-of-certification case.

The Region then issued a compliance specification seeking a 12 to 1 ratio of unit employees to staffing agency employees in order to restore the unit. The supplemental compliance proceeding would result in another Board judgment that is entitled to protection under Section 10(j) while the matter is pending before the Board. Based on the issuance of the compliance specification, the Board determined that Section 10(j) proceedings were necessary to restore the unit and to protect the efficacy of the bargaining order being sought in the contempt proceeding. A district court granted an injunction in this case.

The six cases authorized by the Board fell within the following categories as described in General Counsel Memoranda 06-02, 01-03, 98-10, 89-4, 84-7 and 79-77:

Category	Number of Cases In Category	Results
1. Interference with organizational campaign (no majority)	0	- - -
2. Interference with organizational campaign (majority)	0	- - -
3. Subcontracting or	1	Case is pending.

other change to avoid bargaining obligation		
4. Withdrawal of recognition from incumbent	0	- - -
5. Undermining of bargaining representative	2	Won one case; one case was partial win.
6. Minority union recognition	0	- - -
7. Successor refusal to recognize and bargain	1	Case is pending.
8. Conduct during bargaining negotiations	1	Case is pending.
9. Mass picketing and violence	0	- - -

Category	Number of Cases In Category	Results
10. Notice requirements for strikes and picketing (8(d) and 8(g))	0	- - -
11. Refusal to permit protected activity on property	0	- - -
12. Union coercion to achieve unlawful object	0	- - -
13. Interference with access to Board processes	0	- - -
14. Segregating assets	1	Settled after petition filed.
15. Miscellaneous		- - -